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## MR. TRY-IT GOES TO WASHINGTON: LAW AND POLICY AT THE AGRICULTURAL ADJUSTMENT ADMINISTRATION

Daniel R. Ernst\*

In December 1933, Jerome Frank, the general counsel of the Agricultural Adjustment Administration (AAA) but better known for writing *Law and the Modern Mind* (1930), a sensational attack on legal formalism, told an audience at the Association of American Law Schools a parable about two lawyers in the New Deal, each required to interpret the same ambiguous language of a statute. The first lawyer, “Mr. Absolute,” reasoned from the text and canons of statutory interpretation without regard for the desirability of the outcome. “Mr. Try-It,” in contrast, began with the outcome he thought desirable. He then said to himself, “The administration is for it, and justifiably so. It is obviously in line with the general intention of Congress as shown by legislative history. The statute is ambiguous. Let us work out an argument, if possible, so to construe the statute as to validate this important program.”<sup>1</sup> Although the memoranda the two produced were interchangeable, Mr. Try-It wrote his in one-fifth the time.<sup>2</sup>

Perhaps some professors in attendance nodded approvingly, but Frank’s speech, later printed in the Congressional Record, was startlingly impolitic in its blurring of the distinction between “law”—Mr. Absolute’s starting place—and “policy”—Mr. Try-It’s. In fact, the general counsel was himself insisting upon this in battles with AAA administrators. How Frank actually drew the line owed less to his legal realist jurisprudence than the persuasiveness of his two associate general counsels, the radicals Lee Pressman and Alger Hiss. They joined him at AAA soon after its creation in

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1. Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., *Experimental Jurisprudence and the New Deal* (Dec. 30, 1933), in 78 CONG. REC. 12,412–14 (1934).

2. *Id.*

May 1933 and were with him when Frank, Pressman, and others were fired in a widely noted “purge” in February 1935.<sup>3</sup>

The circumstances that produced the AAA purge were quite unusual. The firings occurred at an agency, launched in the midst of a national economic emergency, with unprecedented power to organize almost all of American agriculture.<sup>4</sup> Frank combined the legal acumen and business sophistication of a corporate lawyer with the learnedness of a legal intellectual and an emotional vulnerability that made him susceptible to the certitude of his legal lieutenants. The AAA’s first administrator wanted him fired but was forced out instead;<sup>5</sup> the second administrator also decided that Frank had to go but for many months was stymied by Frank’s support from Secretary of Agriculture Henry A. Wallace and Assistant Secretary Rexford Tugwell,<sup>6</sup> who had been one of three Columbia University professors in the original “Brains Trust” that had advised Franklin D. Roosevelt in his successful quest for the presidency.<sup>7</sup> Most AAA administrators were from rural places or understood agriculture from their prior business dealings. In contrast, most of Frank’s lawyers were city dwellers; many were the children of Jewish immigrants. As an administrator observed, “None of them ever sweated a drop in a tobacco field.”<sup>8</sup>

Most remarkably, Frank’s top lawyers were members of a communist underground apparatus later known, after its organizer, as the Harold Ware group.<sup>9</sup> If Frank thought of himself as an “experimentalist” with “a critical attitude towards Marxism and any kind of determinism,”<sup>10</sup> the members of the Ware group considered Frank “politically at best a vacillating liberal.”<sup>11</sup>

Even unusual cases can be instructive, however, if they bring to light tensions and tendencies that typically are too subtle to attract attention. Occurring at the dawn of the modern era of the government lawyer in the United States, when a large cohort of elite law graduates first took entry-level jobs in peacetime Washington, the purge at AAA was one such case. It

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3. See generally Richard Lowitt, *Henry A. Wallace and the 1935 Purge in the Department of Agriculture*, 53 AGRIC. HIST. 607 (1979); Lawrence J. Nelson, *The Art of the Possible: Another Look at the “Purge” of the AAA Liberals in 1935*, 57 AGRIC. HIST. 416 (1983).

4. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 114–15 (1982).

5. *Id.* at 118, 132.

6. See *id.* at 147–49; ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 74–80 (1958).

7. See J. Y. Smith, *Rexford Tugwell, Adviser in FDR’s ‘Brains Trust,’ Dies*, WASH. POST (July 25, 1979), <https://www.washingtonpost.com/archive/local/1979/07/25/rexford-tugwell-adviser-in-fdrs-brains-trust-dies/68a9b1c6-d8c3-44f7-b7d0-2599bada50c4> [https://perma.cc/244K-32LG].

8. Interview by Donald R. Lennon with J. Con Lanier, Adm’r, Agric. Adjustment Admin. 24 (Mar. 19, 1973) (transcript available at <https://digital.lib.ecu.edu/text/10923> [https://perma.cc/34XB-GS8Z]).

9. See G. EDWARD WHITE, *ALGER HISS’S LOOKING-GLASS WARS: THE COVERT LIFE OF A SOVIET SPY* 28–33, 38 (2004).

10. Jerome Frank, *My Own Approach to the New Deal* (on file with the Jerome New Frank Papers, Yale University Library).

11. JOHN J. ABT WITH MICHAEL MEYERSON, *ADVOCATE AND ACTIVIST: MEMOIRS OF AN AMERICAN COMMUNIST LAWYER* 38 (1993).

starkly revealed that successful general counsels not only needed to know the law and master policy but also appraise the political forces constraining their and their clients' decisions.

By March 4, 1933, two different approaches to addressing the calamitous collapse in agricultural prices had substantial adherents. As embodied in the Agricultural Adjustment Act, which President Roosevelt signed into law on May 12, 1933, both approaches guaranteed producers of the most important agricultural products the so-called "parity" price: one that would "give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."<sup>12</sup> The first approach was McNary-Haugenism, named for the sponsors of a bill embodying it that twice passed Congress only to be vetoed by Calvin Coolidge.<sup>13</sup> It was the brainchild of George Peek, president of the Moline Plow Company and later the AAA's first administrator.<sup>14</sup> The plan did not restrict production; instead, it used marketing agreements between producers and processors to guarantee farmers the parity price and paid for it with a tax on processors, which they passed on to consumers, and whatever was realized by dumping surpluses overseas.<sup>15</sup>

The second approach, domestic allotment, offered the parity price to corn, rice, tobacco, and hog farmers who agreed to limit their production to levels set by the government and allocated by local committees of producers. As the political sociologists Kenneth Finegold and Theda Skocpol write, it required the government to determine "parity targets, processing taxes, benefits rates, production levels, and acreage bases."<sup>16</sup> When implemented in 1933, too late for farmers to have figured it into their spring planting and farrowing, domestic allotment led to the ploughing up of cotton fields and the slaughter of some six million piglets. Peek deplored the program as "socialized farming," but it was favored by Tugwell, Wallace, and an influential group of agricultural economists.<sup>17</sup>

To ensure the passage of the farm bill, the two camps jointly proposed that the Agricultural Adjustment Act authorize the AAA to pursue both programs. Peek complied by creating two parallel divisions for most crops: a Division of Processing and Marketing, staffed largely with business executives from Dole Pineapple, Cudahy Packing, and other food processors, to implement McNary-Haugenism; and a Division of Production, headed by the farm expert Chester Davis, to implement the domestic allotment plan.<sup>18</sup> After

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12. Agricultural Adjustment Act, Pub. L. No. 73-10, § 2(1), 48 Stat. 31, 32 (1933). The period was August 1909 to July 1914 for all agricultural commodities except tobacco, for which the base period was August 1919 to July 1929.

13. See John D. Black, *The McNary-Haugen Movement*, 18 AM. ECON. REV. 405, 405, 419 (1928).

14. VAN L. PERKINS, *CRISIS IN AGRICULTURE: THE AGRICULTURAL ADJUSTMENT ADMINISTRATION AND THE NEW DEAL, 1933*, at 21–22 (1969).

15. *Id.*

16. KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA'S NEW DEAL* 17 (1995).

17. GEORGE N. PEEK WITH SAMUEL CROWTHER, *WHY QUIT OUR OWN* 11 (1936).

18. FINEGOLD & SKOCPOL, *supra* note 16, at 108–09.

Davis succeeded Peek in December 1933, domestic allotment became AAA's dominant approach for most agricultural products, the principal exception being milk and dairy products.<sup>19</sup> In whatever combination, AAA programs, assisted by a drought, raised farm income 50 percent and kept the Midwest in the Democratic column in the 1934 midterm and 1936 presidential election.<sup>20</sup>

Roosevelt's disregard for the neat hierarchy of Weberian bureaucracies was nowhere more evident than in his farm program.<sup>21</sup> As a formal matter, AAA was an agency located within the U.S. Department of Agriculture (USDA), but its importance dwarfed that of other USDA bureaus. Further, Administrator Peek had not unreasonably hoped to be named Secretary himself, and he retained from the McNary-Haugen campaign a vast network of farm leaders whose support was thought vital for the success of any farm program.<sup>22</sup> Peek and Wallace arrived at a crucial meeting with Roosevelt with conflicting organizational charts: Peek's gave him a direct path to the White House; Wallace's required Peek to report to him.<sup>23</sup> Although both officials claimed victory,<sup>24</sup> in fact Roosevelt split the difference: Peek could bring major disagreements directly to Roosevelt, but only in the company of Wallace.<sup>25</sup> Such an arrangement was in keeping with the Agricultural Adjustment Act, which, as Frank noted to Peek, charged the Secretary of Agriculture, not the administrator, with implementing its provisions.<sup>26</sup> A further complication was Tugwell's relationship with Roosevelt, which predated and was closer than Wallace's. Although Wallace outranked Tugwell, Roosevelt would have been hard-pressed not to hear the former Brain Truster out should he and Wallace differ.

The relations among the AAA's general counsel, his nominal boss Peek, and the USDA secretariat were another anomaly. Jerome Frank, the grandson of German Jews who immigrated to the United States in the 1840s and 1850s, had the highest grade point average in school history when he received his law degree from the University of Chicago in 1912.<sup>27</sup> He worked as a clerk, associate, and finally partner at the leading Chicago law firm Levinson, Becker, where even a demanding corporate practice could not contain his questing mind and acute social conscience. He hobnobbed with

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19. *Id.* at 109; see also SCHLESINGER, *supra* note 6, at 75–76.

20. FINEGOLD & SKOCPOL, *supra* note 16, at 109–10; WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 77 (1963).

21. See JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 371 (1956).

22. See GILBERT C. FITE, GEORGE N. PEEK AND THE FIGHT FOR FARM PARITY 156–57, 248 (1954).

23. See KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS 278 (1986).

24. See *id.*

25. See IRONS, *supra* note 4, at 119; PERKINS, *supra* note 14, at 86 (noting that Peek insisted on “jointly” being able to have access to Roosevelt with Wallace).

26. THE REMINISCENCES OF JEROME N. FRANK 22, 77 (Oral History Research Office, Columbia Univ. 1960).

27. WALTER E. VOLKOMER, THE PASSIONATE LIBERAL: THE POLITICAL AND LEGAL IDEAS OF JEROME FRANK 1 (1970); Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & Soc’y 175, 176 (1991).

Carl Sandburg, John Gunther, Edgar Lee Masters, and other Chicago literati; he was the legal brains behind a decade-long and ultimately unsuccessful attempt to subject the city's streetcars to effective municipal control; he served in the kitchen cabinet of the Chicago reform mayor William Dever; he was a witty and dazzling conversationalist who, with his poet wife Florence, daringly discussed Freudianism and related "somatic" topics at the dinner parties of Winnetka's *bon ton*.<sup>28</sup>

"[W]ith all this," an associate at Levinson, Becker recalled, "Jerry had great feelings of insecurity. He would worry legal questions to death. For no apparent reason, he would write long memoranda for the files defending his decisions, covering himself for each step he took in any difficult case or set of negotiations."<sup>29</sup> In 1928, Frank confessed his "growing . . . uncertainty of predictions as to what courts would decide" to a fellow University of Chicago law graduate.<sup>30</sup> He developed his misgivings in what was nominally a statement of what his circle of alumni wished for in a replacement for James Parker Hall, who had served as dean ever since Joseph Henry Beale returned to Harvard Law School after establishing legal education in Hyde Park on principles developed by Harvard's Christopher Columbus Langdell.<sup>31</sup>

Younger graduates of the law school, Frank wrote, "were puzzled and dismayed, when they began their professional careers, to find that they were practicing an art full of bewildering uncertainties where they had been led to expect that they would be practicing something in the nature of an exact science."<sup>32</sup> They had been taught that law was "a definite and complete body of doctrine," distinct from the facts to which it was applied.<sup>33</sup> But this was a fiction that ill-prepared them for the actual practice of law.<sup>34</sup> The law of corporations, for example, could not be deduced from first principles; it could only be understood after taking stock of "manufacturing, stock market operations, labor questions, men's cupidities and men's dreams."<sup>35</sup> Even an honors law graduate, Frank wrote, would go "down in the struggle" unless he learned to adjust legal abstractions to the "concreteness of daily life."<sup>36</sup>

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28. VOLKOMER, *supra* note 27, at 5–6; Letter from Ulysses S. Schwartz, Judge for the Superior Court of Cook Cty., to Richard Rovere (Dec. 20, 1946) (on file with the Richard Rovere Papers, Franklin D. Roosevelt Presidential Library & Museum).

29. ABT, *supra* note 11, at 17. Robert Glennon unearthed one such memo from July 1935, shortly after Frank's time at the AAA. ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 219 n.70 (1985).

30. Letter from Jerome N. Frank to Laird Bell 1 (Apr. 12, 1928) (on file with the Laird Bell Papers, University of Chicago Library).

31. *Id.*; see also WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 46–59, 71–75 (1982). See generally Floyd R. Mechem, *James Parker Hall*, 23 ILL. L. REV. 1 (1928).

32. First Draft of Statement by Alumni of Recommendations as to Character of New Dean 2 (Apr. 12, 1928) (on file with the Laird Bell Papers, University of Chicago Library).

33. *Id.*

34. See *id.*

35. *Id.* at 3.

36. *Id.* at 6. Frank published an elaboration of his views in *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

Frank later described himself in those years as “restless, wanting to do everything except what I was doing.”<sup>37</sup> He was “constantly rebelling against being a lawyer—doing it competently, but still, interiorly, objecting to it.”<sup>38</sup> Internal conflicts absorbed his energy. Then, during a six-month business trip to New York in 1928, a psychiatrist suggested that he try psychoanalysis.<sup>39</sup> Frank somehow persuaded him that twice-daily sessions during his stay would suffice. The experience, Frank later claimed, marked “a turning point in [his] life.”<sup>40</sup>

In 1929, Frank moved his family to New York and, on the recommendation of the federal judge Julian Mack, who had been one of his law professors, joined Chadbourne, Stanchfield and Levy. Levinson, Becker had been, in Frank’s words, a “small large firm”; Chadbourne was one of New York’s large Wall Street firms with “a factory system.”<sup>41</sup> Some partners were Jews, others were Gentiles, but apparently all of them were ruthlessly avaricious. Although Frank was clearing \$35,000 annually,<sup>42</sup> the firm’s rapaciousness appalled him. He sought some equivalent to the political brawls that had sustained him in Chicago but could find no entrée to city hall or the governor’s mansion. Authorship was another possible escape. He had written two thirds of a novel on his Chicago commutes; now he tackled nonfiction on his train rides from Croton-on-Hudson to Manhattan and back again. Published in the fall of 1930, *Law and the Modern Mind* joined Frank’s critique of legal formalism to a Freudian explanation of its appeal. The desire for certainty in law, he argued, was an adult’s version of a childish need for an authoritative father figure in the judge. What once tormented Frank—“the widespread notion that law either is or can be made approximately stationary and certain”—he now understood to be a delusion.<sup>43</sup> Mature thinkers freed themselves of this “carry-over of the childish dread of, and respect for, paternal omnipotence.”<sup>44</sup> They accepted that law was the product of adaptation to “the realities of contemporary, social, industrial and political conditions.”<sup>45</sup> And they pictured “law as continuously more efficacious social engineering, satisfying, through social control, as much as is possible of the whole body of human wants.”<sup>46</sup> Only legal formulations that, after “repeated checkings,” were shown “still to be working well” would be treated, “for the time being,” as “fixed and settled.”<sup>47</sup>

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37. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 11.

38. *Id.* at 12.

39. *Id.* at 11.

40. *Id.*

41. *Id.* at 12.

42. See DAVIS, *supra* note 23, at 276. Frank’s annual salary at the AAA was \$10,000. EXEC. COUNCIL, LEGAL STUDY QUESTIONNAIRE: GENERAL COUNSEL’S OFFICE, AGRICULTURAL ADJUSTMENT ADMINISTRATION, DEPARTMENT OF AGRICULTURE 1 (on file with the Records of the Office of Government Reports, National Archives at College Park, Maryland).

43. JEROME FRANK, *LAW AND THE MODERN MIND* 13 (Anchor Books ed. 1963).

44. *Id.* at 269.

45. *Id.* at 259.

46. *Id.*

47. *Id.* at 268.

The book was a sensation. It restated for a wide audience the attacks of such “legal realist” law professors as Walter Wheeler Cook, Karl Llewellyn, Max Radin, and Hessel Yntema. Felix Frankfurter called it “the most refreshing and self-examining piece of writing on law” of recent years and struck up an acquaintance with Frank through their mutual friend Judge Julian Mack.<sup>48</sup> Yale’s legal realists finagled an appointment for him as a “research associate.” Although Frank later deprecated his duties—the most important one, he claimed, was smuggling bootleg liquor to New Haven—he did become good friends with Thurman Arnold, William O. Douglas, and other members of the faculty.<sup>49</sup>

Such distractions did not make the skullduggery at the Chadbourne firm any more palatable. Before FDR’s election, Frank told Frankfurter of his unhappiness; after it, he asked the Harvard law professor to recommend him for positions in Washington or Albany.<sup>50</sup> In mid-March, Frankfurter did just that when Tugwell needed a solicitor for the USDA. Frank was “aggressively imaginative,” Frankfurter explained, with both a “playful, dialectic, argumentative side” and a “penetrating, practical-experience talent for bringing results to pass in the world of affairs.”<sup>51</sup> Wallace offered Frank the post, but it figured too centrally in the calculations of Postmaster General James Farley, Roosevelt’s principal patronage dispenser, to go to a New Yorker.<sup>52</sup> Tugwell and Wallace then decided that general counsel of the AAA was actually the more important post and that Frank would have it as soon as the Agricultural Adjustment Act became law.<sup>53</sup>

Meanwhile, Frank stayed in Washington, performing various tasks for Wallace. Frank, Tugwell, and Wallace briefly roomed together in Wallace’s spacious apartment until his family showed up. Thereafter Frank and Tugwell shared rented quarters until their wives joined them.<sup>54</sup> “Night after night,” wrote the historian Arthur M. Schlesinger, Jr., “stray lawyers, economists, newspapermen, and innocent bystanders appeared at the house . . . and indulged heavily in conversation and bourbon.”<sup>55</sup> Frank was delighted by the parallels between the institutional economist Tugwell’s debunking of the free markets and the legal realists’ debunking of legal

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48. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Jerome N. Frank (Oct. 9, 1930) (on file with the Felix Frankfurter Papers, Library of Congress).

49. See THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 12–13.

50. Letter from Jerome N. Frank to Felix Frankfurter, Professor, Harvard Law Sch. (Nov. 30, 1932) (on file with the Richard Rovere Papers, Franklin D. Roosevelt Presidential Library & Museum); Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Jerome N. Frank (Oct. 19, 1932) (on file with the Richard Rovere Papers, Franklin D. Roosevelt Presidential Library & Museum).

51. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Rexford G. Tugwell, Assistant Sec’y of Agric., U.S. Dep’t of Agric. (Mar. 15, 1933) (on file with the Felix Frankfurter Papers, Library of Congress).

52. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 14–15, 64–67; Interview with Jerome N. Frank (Aug. 1, 1938) (notes on file with the Joseph Alsop and Stewart Alsop Papers, Library of Congress).

53. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 15.

54. *Id.* at 25.

55. SCHLESINGER, *supra* note 6, at 50.



formalism. In his Association of American Law Schools (AALS) address, Frank proposed that legal realism be renamed “experimental jurisprudence” because of its “congeniality” with the approach Tugwell called “experimental economics.”<sup>56</sup> Like the economist, Frank considered the New Deal “an elaborate series of experiments which will seek to show that a social economy can be made to work for human welfare by readjustments which leave the desire for private financial gain still operative to a considerable extent.”<sup>57</sup> He believed it would “permit the profit system to be tried, for the first time, as a consciously directed means of promoting the general good.”<sup>58</sup>

Frank also believed that he and Wallace fundamentally agreed on the AAA’s mission. Their relations “continued to be very friendly” throughout 1933, he recalled.<sup>59</sup> “I was completely in Wallace’s confidence, and he . . . backed me up a hundred percent.”<sup>60</sup> Or so he believed: as Gardner Jackson, a journalist and social activist who closely observed him at the AAA, wrote, once someone agreed with Frank on the desirability of a course of action, “Jerry in his own mind imbued that person with all the ardent disinterestedness characterizing his own pursuit of his objectives.”<sup>61</sup>

Mindful that delay had sunk Frank’s appointment as solicitor, Tugwell and Wallace swore him in on the day Roosevelt signed the Agricultural Adjustment Act.<sup>62</sup> Peek had wanted to hire Frederic Lee, an ally from the McNary-Haugen campaign and a principal drafter of the new law.<sup>63</sup> Recognizing that Frank would be the secretariat’s man in the AAA, Peek gathered up Wallace and went to Roosevelt to insist on Frank’s removal.<sup>64</sup> As a big-city lawyer and a Jew, Frank would be unacceptable to farmers and farm leaders, Peek argued.<sup>65</sup> Besides, Peek and Frank had a history. When Peek was hired to manage the reorganized Moline Plow, Frank had urged the creditors’ committee to reject his proposed employment contract because of its too-generous profit-sharing provision.<sup>66</sup> Peek got his contract anyway, and when he resigned over a business dispute, he insisted on its terms.<sup>67</sup>

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56. Frank, *supra* note 1, at 12,412, 12,414.

57. *Id.* at 12,414.

58. *Id.*; see also ALLAN G. GRUCHY, MODERN ECONOMIC THOUGHT: THE AMERICAN CONTRIBUTION 405–70 (1947).

59. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 111.

60. *Id.* at 112.

61. Letter from Gardner Jackson to Richard Rovere 3 (Dec. 18, 1946) (on file with the Richard Rovere Papers, Franklin D. Roosevelt Presidential Library & Museum).

62. Compare Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933) (stating that the legislation is approved May 12, 1933), with Letter from the U.S. Dep’t of Agric., Office of Pers. & Bus. Admin., to Jerome N. Frank (May 12, 1933) (on file with the Jerome New Frank Papers, Yale University Library) (notifying Frank of his appointment effective May 12, 1933).

63. See PEEK, *supra* note 17, at 93, 109; PERKINS, *supra* note 14, at 38, 96.

64. See PEEK, *supra* note 17, at 21; THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 73–75.

65. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 73–74. In print, Peek obfuscated: “[Frank’s] personality was such as not to inspire the confidence of the farm leaders.” PEEK, *supra* note 17, at 21.

66. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 19–20.

67. FITE, *supra* note 22, at 76.

Although Frank had confidentially urged the creditors to settle, they resisted just long enough to persuade Peek that Frank had counseled otherwise.<sup>68</sup> Peek ended up independently wealthy and permanently resentful of the young Jewish lawyer from Chicago.<sup>69</sup>

Once again, Wallace acquiesced, but this time Frank, who had been recruiting lawyers for over a month, refused to accept the decision. “This is most infamously unfair,” he protested to Tugwell. “I’ve severed my connections with [my] law firm. I took a chance that the bill might not pass.”<sup>70</sup> Frank also pointed out that he had been working for Wallace “on a variety of other things,” including speeches and a reorganization plan for the executive branch.<sup>71</sup> The antisemitism of Peek’s case against him rankled; as general counsel, Frank fretted over hiring too many Jewish lawyers.<sup>72</sup> And presumably he pointed out to Tugwell that he and Wallace could not control farm policy without a strategically placed ally within the AAA. Apparently Tugwell interceded with Roosevelt, for the next day Wallace, “in great distress,” told Peek that Frank had to be retained. “If you force Frank to resign, I will also have to resign,” Peek recalled Wallace saying. “[I]t will interfere with all of our plans.”<sup>73</sup>

Peek told Frank that “Wallace hasn’t anything to do with this show.”<sup>74</sup> When Frank, pointing to the statute, disagreed, Peek used his \$10,000 salary as administrator to hire Lee as his personal lawyer and brought him along to meetings, notwithstanding his lack of an official appointment.<sup>75</sup> When Frank tried to staff his legal division, he encountered aggravating roadblocks. Farley required Frank’s appointees to obtain “endorsements” from home-state politicians attesting that the lawyers had not actively opposed a Democratic candidate.<sup>76</sup> In addition, Peek’s coadministrator slow-walked

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68. See THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 56–58.

69. *Id.* at 54–58; see PEEK, *supra* note 17, at 21–22.

70. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 73–74.

71. *Id.*; Interview with Jerome N. Frank, *supra* note 52, at 1; Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Lee Pressman (Apr. 10, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

72. Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Alger Hiss, Frank Shea & R. K. McConaughy (Dec. 26, 1934) (on file with the Records of the Office of the Secretary of Agriculture, National Archives at College Park, Maryland); Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Henry Wallace, Sec’y of Agric., U.S. Dep’t of Agric. (Aug. 20, 1933) (on file with the Jerome New Frank Papers, Yale University Library); Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Felix Frankfurter, Professor, Harvard Law Sch. (Apr. 18, 1933) (on file with the Jerome New Frank Papers, Yale University Library); Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Julian Mack (Apr. 17, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

73. PEEK, *supra* note 17, at 22.

74. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 74.

75. *Id.* at 74–77, 100–01; see also PERKINS, *supra* note 14, at 96.

76. Farley generally insisted upon endorsements, but some agency heads hired lawyers without them. DANIEL SCROOP, MR. DEMOCRAT: JIM FARLEY, THE NEW DEAL, AND THE MAKING OF MODERN AMERICAN POLITICS 84 (2006); Daniel R. Ernst, “In a Democracy We Should Distribute the Lawyers”: *The Campaign for a Federal Legal Service, 1933–1945*, 58 AM. J. LEGAL HIST. 4, 11 (2018).

appointments and, after this dodge failed, complained that Frank had hired too many Jews.<sup>77</sup> The move backfired when columnists reported that USDA's "Anglo-Saxon purists" had placed "black marks after some of the bluest bluebloods" in the legal division, including Alger Hiss.<sup>78</sup>

From the start, Frank envisioned a legal division staffed along the lines of a Wall Street firm. The "stupendous" legal task confronting the AAA, he warned, required "unusual ability and ingenuity on the part of our lawyers."<sup>79</sup> A private corporation faced with a comparable job would hire several leading law firms.<sup>80</sup> "I think it is up to us to do no less."<sup>81</sup> And because the other side would hire "the best legal minds in America," the members of the legal division had to be "as intelligent as the most intelligent lawyers in the United States."<sup>82</sup>

Frank was obliged to find places for several political appointees, including "a moderately capable" protégé of Senator John Bankhead, the son of the president of the Farm Bureau, and Adlai Stevenson, whose father was Peek's friend.<sup>83</sup> Still, he managed to assemble a remarkably able group of lawyers. Frankfurter thought they "not only make up in fertility and imagination and disinterestedness what they lack in experience but . . . in not a few cases have maturity and instinct for experience beyond their years."<sup>84</sup> Lee Pressman, the associate general counsel overseeing marketing agreements, had directly overseen the work of Alger Hiss, the associate counsel overseeing production control, when they were on the *Harvard Law Review*.<sup>85</sup> Frank decided to take him on as his "cub" at Chadbourne when Pressman brilliantly diagnosed a knotty legal issue for him.<sup>86</sup> Hiss had charmed Frankfurter with his cultivation and deportment. The professor chose him to clerk for Justice

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77. Letter from Jerome N. Frank to Henry Wallace, *supra* note 72.

78. Drew Pearson & Robert S. Allen, *The Daily Washington Merry-Go-Round*, UNITED FEATURE SYNDICATE, INC., Aug. 31, 1933, <https://auislandora.wrlc.org/islandora/object/pearson%3A16144#page/1/mode/1up?> [<https://perma.cc/SA95-VSD8>]; *see also* THE REMINISCENCES OF GARDNER JACKSON 438–39 (Oral History Research Office, Columbia Univ. 1959).

79. Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to George N. Peek, Adm'r, Agric. Adjustment Admin. (June 16, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

80. *Id.*

81. *Id.*

82. Jerome N. Frank, Memorandum (Aug. 5, 1933) (on file with the Records of the Office of the Secretary of Agriculture, National Archives at College Park, Maryland); *see also* Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Henry Wallace, Sec'y of Agric., U.S. Dep't of Agric. (Aug. 2, 1933) (on file with the Records of the Office of the Secretary of Agriculture, National Archives at College Park, Maryland).

83. Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Paul Appleby (Aug. 3, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

84. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin. (Sept. 29, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

85. GILBERT J. GALL, PURSUING JUSTICE: LEE PRESSMAN, THE NEW DEAL AND THE CIO 14 (1999).

86. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 131.

Oliver Wendell Holmes and, after Hiss had worked at top firms in Boston and New York, recommended him to Frank.<sup>87</sup>

Frank hired two lawyers he knew from Levinson, Becker, John Abt and Arthur Bachrach, and gave temporary assignments to his Yale friends Thurman Arnold and Wesley Sturges.<sup>88</sup> Other AAA lawyers included the Irishman Francis Shea (chief of the legal opinion section at the AAA and another Frankfurter favorite), Carolyn Agger, Abe Fortas, Louis Jaffe, Ida Klaus, David Kreeger, Victor Rotnem (Pressman's lieutenant for milk marketing agreements), Telford Taylor, and Nathan Witt.<sup>89</sup> The Gentile Stevenson dubbed Sigmund Timberg, Aaron Muravchik, and Bruno Schachner, the "three wise men from the *Columbia Law Review*" and claimed the Jewish trio arrived in the capital sharing a single suitcase.<sup>90</sup> Not without justification, an alumnus of the legal division called it "the greatest law firm in the country."<sup>91</sup>

As Schlesinger wrote, "[Frank] provided exciting leadership, fascinating his aides with his speed and lucidity, shaming them with his memory, resourcefulness, and limitless energy. The young men, dazzled by his example, worked twenty hours a day, slept on couches in their offices and hastily briefed themselves on the agricultural life."<sup>92</sup> Stevenson marveled that Frank would schedule appointments as early as eight in the morning and as late as eleven at night. Fortas claimed Frank would keep talking at full speed when flat on his back, self-administering nose drops for his sinuses.<sup>93</sup> Whether talking to "a Justice or a cub," another lawyer recalled, Frank displayed "the same generous interest and sympathetic consideration."<sup>94</sup> Gardner Jackson believed that even "the lowliest of Jerry's hundreds of lawyers" shared his vision of the AAA as "a holy crusade."<sup>95</sup>

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87. ALGER HISS, *RECOLLECTIONS OF A LIFE* 10–19 (1988); MURRAY KEMPTON, *PART OF OUR TIMES: SOME RUINS AND MONUMENTS OF THE THIRTIES* 31 (Modern Library ed. 1998); WHITE, *supra* note 9, at 3–33 (2004).

88. ABT, *supra* note 11, at 16–17, 22, 30–31; IRONS, *supra* note 4, at 125.

89. See IRONS, *supra* note 4, at 125; THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK 240–41 (Katie Louchheim ed., 1983); Carolyn Agger, Application for Position at the Reconstruction Finance Corp. (Apr. 6, 1935) (on file with the Jerome New Frank Papers, Yale University Library) (noting Agger's employment in the legal division of the AAA and listing Frank as a reference); Memorandum from Jerome Frank, Gen. Counsel, Agric. Adjustment Admin., to Mr. Byrd (Nov. 14, 1934) (on file with the Jerome New Frank Papers, Yale University Library); Roster of Harvard Law School Men in Office of General Counsel, A.A.A. on February 5, 1933 (on file with the Thomas G. Corcoran Papers, Library of Congress).

90. Adlai E. Stevenson, Agriculture, Alcohol and Administration 12 (1935) (unpublished manuscript) (on file with the Adlai E. Stevenson Papers, Princeton University Library); Roster of Harvard Law School Men in Office of General Counsel, A.A.A. on February 5, 1933, *supra* note 89.

91. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 30 (1990).

92. SCHLESINGER, *supra* note 6, at 50.

93. Letter from Abe Fortas to Richard Rovere (Oct. 25, 1946) (on file with the Richard Rovere Papers, Franklin D. Roosevelt Presidential Library & Museum); Stevenson, *supra* note 90, at 10.

94. Letter from Raoul Berger to Richard H. Rovere (Nov. 4, 1946) (on file with the Richard Rovere Papers, Franklin D. Roosevelt Presidential Library & Museum). Berger worked for Frank a few years after the AAA purge.

95. Letter from Gardner Jackson to Richard Rovere, *supra* note 61, at 7.

But Jackson, at least, detected a flaw in Frank's emotional makeup that his subordinates also saw and exploited.<sup>96</sup> Although Frank later claimed that psychoanalysis cured him of internal "frictions"<sup>97</sup> and self-doubt, during the New Deal he was hardly the emotionally mature experimentalist of his AALS address who he had boldly acted despite "partial and unavoidable ignorance."<sup>98</sup> Frank "yearned for certainty," Jackson maintained.<sup>99</sup> "[H]is never-resting brain" seemed "always to be on the search for more and more precision."<sup>100</sup> Abt claimed that he, Pressman, and the other members of the Ware group "looked down our noses at Jerome because he was a waverer."<sup>101</sup> After interviewing several former AAA lawyers, Frank's biographer wrote that the general counsel left "no stone unturned" and explored "all facets of a problem" before settling on a strategy.<sup>102</sup>

Jackson believed Frank found the assurance he needed in Lee Pressman, his cocksure and sardonic lieutenant, who was "certainty in the human form."<sup>103</sup> Even after Pressman revealed that he had been a communist at the AAA, Frank praised him as "quick, sure, ingenious," and probably "the best lawyer that I ever met," who had "made life possible for me by his organizational skill."<sup>104</sup> Jackson went further: "Pressman dominated Jerome Frank."<sup>105</sup> He "could turn Jerry around on a decision on tactics almost at will, and not infrequently did so."<sup>106</sup> Thomas Corcoran, Frankfurter's best-connected protégé in Washington, also apparently considered Pressman a kind of Iago. Corcoran told Secretary of the Interior Harold Ickes in 1937 that Pressman had "almost ruined Rex Tugwell and [Harry] Hopkins," two later bosses in the New Deal, by "stimulating" their ambitions.<sup>107</sup>

Frank needed no stimulation from anyone to insist that food processors not use marketing agreements to pad their profits. Peek, in contrast, believed that the companies were free to make whatever agreements they wished as long as farmers got the parity price. His philosophy was well stated by the president of the Farm Bureau, who demanded of Frank, "What the hell have

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96. *See generally id.* Jackson's recollections are not beyond challenge. An alcoholic, he was not above embellishing his tale of the warmhearted liberal Frank's victimization by the hardheaded communist Pressman. ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* 155 (1978). Still, I have found nothing to contradict and much to corroborate Jackson's account.

97. *THE REMINISCENCES OF JEROME N. FRANK*, *supra* note 26, at 11.

98. Frank, *supra* note 1, at 12,412.

99. Letter from Gardner Jackson to Richard Rovere, *supra* note 95, at 6.

100. *Id.*

101. GALL, *supra* note 85, at 26.

102. GLENNON, *supra* note 29, at 219 n.70. Glennon interviewed John Abt, Sigmund Timberg, Telford Taylor, and Nathan Witt in May 1979.

103. *THE REMINISCENCES OF GARDNER JACKSON*, *supra* note 78, at 562; *see also* Letter from Gardner Jackson to Richard Rovere, *supra* note 95, at 6.

104. *THE REMINISCENCES OF JEROME N. FRANK*, *supra* note 26, at 131-33.

105. *THE REMINISCENCES OF GARDNER JACKSON*, *supra* note 78, at 561.

106. Letter from Gardner Jackson to Richard Rovere, *supra* note 95, at 6.

107. HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES: THE INSIDE STRUGGLE 1936-1939*, at 34-35 (1954).

we got to do with the consumer? This is the Department of Agriculture!”<sup>108</sup> But Wallace, who hoped to succeed FDR, and Tugwell cared about the entire economy and believed higher prices would hurt farmers by making their own purchases more costly. Frank agreed. The “indiscriminate creation of monopolies,” without regard for their efficiency, he later explained, “was certainly about as bad a thing as you could do and . . . wouldn’t effectuate the policy” of the Agricultural Adjustment Act.<sup>109</sup>

Assured by Wallace that he would not approve an order before the legal division reviewed it, Frank met Peek’s objections by pointing to two provisions in the statute.<sup>110</sup> The first was a section in the declaration of policy, which was suggested by Tugwell’s fellow institutional economist, Mordecai Ezekiel, but embodied in confusing language drafted by Frederic Lee.<sup>111</sup> The statute was intended not simply to guarantee farmers the parity price but also “to protect the consumers’ interest by readjusting farm production at such level as will not increase the percentage of the consumers’ retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer” during the parity period.<sup>112</sup> Pointing to that section, Frank successfully argued for the creation of an office of the Consumers’ Counsel to check on the findings of the commodities divisions. Frank’s Croton-on-Hudson neighbor Frederic Delano, FDR’s uncle and an elder statesman of the city-planning movement, headed the office. Thomas Blaisdell, assisted by “quite a group of good accountants,” became its top economist.<sup>113</sup> Gardner Jackson signed on as a publicist and strategist.<sup>114</sup>

The second provision exempted marketing agreements from the federal antitrust laws *if* they effectuated the statute’s policies.<sup>115</sup> Marketing agreements that gave only a slight benefit to farmers and a huge one to processors were not exempt, Frank argued, particularly if the processors’ share came “out of the hide of the consumer.”<sup>116</sup> To verify that the processors were not mulcting the public, his lawyers insisted, over Peek’s objection, on clauses giving the legal division and Consumers’ Counsel access to companies’ “books and records.”<sup>117</sup>

Peek and Frank battled each other into December 1933. The administrator was convinced, as he later put it, that the legal division wanted to transform

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108. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 22–23.

109. *Id.* at 94.

110. *Id.* at 88–89.

111. *Id.* at 71.

112. Agricultural Adjustment Act, Pub. L. No. 73-10, § 2(3), 48 Stat. 31, 32 (1933).

113. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 22. On Blaisdell, see LANDON R. Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 212–14 (2013).

114. THE REMINISCENCES OF GARDNER JACKSON, *supra* note 78, at 410–13.

115. Agricultural Adjustment Act § 8(2), 48 Stat. 31, 34.

116. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 92.

117. Memorandum from Thomas Blaisdell on the Policy Behind the Broad (Standard) Books and Records Clause (June 22, 1934) (on file with the Jerome New Frank Papers, Yale University Library).

the AAA “from a device to aid the farmers into a device to introduce the collectivist system of agriculture into this country.”<sup>118</sup> He cited a conversation in which Pressman proposed nationalizing not only the milk industry but also grocery and department stores. When Peek sputtered that that would be communism, Pressman coolly replied, “Call it what you may, this plan is failing and Government operation has to come.”<sup>119</sup> An administrator in the tobacco section had a similar exchange with Pressman and his associates.<sup>120</sup> “They wanted to take the profit out of business,” he recalled.<sup>121</sup> “Then they wanted to take over and run the business.”<sup>122</sup> When the administrator protested that “you’d [sic] have to change the whole system,” the lawyers replied, “Well, let’s [sic] change the system.”<sup>123</sup>

Frank did think the distribution of milk ought to be a public utility, but the industry was already so heavily regulated that the U.S. Supreme Court reached much the same conclusion in 1934.<sup>124</sup> His talk of economic experimentation left Frankfurter sighing that Frank “hasn’t much sense.”<sup>125</sup> But Congress had already taken the really bold step by asking the AAA to organize what Stevenson called “gigantic trusts in all the food industries.”<sup>126</sup> Frank’s principal aim was the same as Wallace’s: to keep “a scheme for propping up lots of big farmers” from overcharging consumers.<sup>127</sup> As Frank later protested to Frankfurter, “The packers and canners . . . were bitter because I helped to prevent their obtaining unregulated and unscrutinized exemptions from the anti-trust laws.”<sup>128</sup> He had been “the one person with a position of importance in AAA who represented Wallace’s desires to keep down and if possible reduce price spreads and to avoid abuses of monopoly privileges.”<sup>129</sup>

It had not been a walk in the park. The situation was “impossible,” Frank complained to Wallace’s assistant.<sup>130</sup> “I’m representing one man

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118. PEEK, *supra* note 17, at 20.

119. George N. Peek with Samuel Crowther, *In and Out: Adventures in Crop Control*, SATURDAY EVENING POST, May 30, 1936, at 18.

120. Interview by Donald R. Lennon with J. Con Lanier, *supra* note 8, at 24.

121. *Id.*

122. *Id.*

123. *Id.* According to Peek, AAA’s leftists told one of his associates that “the mission of the Roosevelt Administration [was] to turn us into some new kind of socialist state” and urged him to join the cause. PEEK, *supra* note 17, at 114–15.

124. *Nebbia v. New York*, 291 U.S. 502 (1934); Stevenson, *supra* note 90, at 9.

125. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Louis D. Brandeis, Assoc. Justice, U.S. Supreme Court (Feb. 9, 1935) (on file with the Louis D. Brandeis Collection, University of Louisville Brandeis School of Law).

126. Letter from Adlai E. Stevenson to Ellen Stevenson (July 1933), in 1 THE PAPERS OF ADLAI E. STEVENSON 248, 249 (1972).

127. Interview with Louis L. Jaffe by Jerold S. Auerbach 94 (1972) (on file with the American Jewish Committee Oral History Collection, New York Public Library).

128. Letter from Jerome N. Frank to Felix Frankfurter, Professor, Harvard Law Sch. (Dec. 20, 1935) (on file with the Jerome New Frank Papers, Yale University Library).

129. Letter from Jerome N. Frank to Felix Frankfurter, Professor, Harvard Law Sch. (Jan. 21, 1936) (on file with the Jerome New Frank Papers, Yale University Library).

130. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 155.

nominally,” but in fact “[I’m] openly at war with [him].”<sup>131</sup> “I can’t stand it. I’m going to quit.”<sup>132</sup> Peek also found the situation intolerable. On November 15, he demanded that Wallace fire Frank. The general counsel was sabotaging the milk marketing agreements, Peek charged, and had “become almost impossible to a number of our most valuable assistants and to me.”<sup>133</sup>

That Frank had in fact been Wallace’s faithful “watchdog”<sup>134</sup> was confirmed at a news conference on December 6, 1933. In what a journalist termed “the coolest political murder that has been committed since Roosevelt came into office,” the Secretary, with Peek at his side, declared the AAA’s milk program a failure.<sup>135</sup> Days later, Peek was gone, replaced by Chester Davis. The legal division exulted. “We young fellows were well aware of the varied crew that manned the New Deal ship of state and that some of our crusading efforts had to be directed inwards,” Alger Hiss later recalled.<sup>136</sup> Peek was “out of step with what we believed was the ‘true’ spirit of the New Deal”—that of Wallace and Roosevelt.<sup>137</sup> His “discomfiture and exit seemed to us part of the script.”<sup>138</sup>

Out of fairness to Davis, whom he considered a much more reasonable person, Frank stopped meeting with Wallace unless Davis was also present after the spring of 1934.<sup>139</sup> Still, Frank had the Secretary’s word not to approve any order without the legal division’s prior review, and he still believed he would back the legal division in conflicts with the administrator.<sup>140</sup> It did not seem to occur to him that in knifing Peek, Wallace had dispatched “a rival potentate” and that Davis might oppose Frank without publicly embarrassing Wallace.<sup>141</sup>

The legal division’s close scrutiny of marketing agreements continued to generate conflict. Administrators were quick to blame the lawyers’ objections on their ignorance of farming. Decades later, the fact that the “bunch of jews” sent from Washington to North Carolina could not distinguish a tobacco barn from a tobacco warehouse still irritated one administrator.<sup>142</sup> Others had rolled their eyes when Stevenson asked a delegation of California deciduous tree fruit growers what “deciduous” meant<sup>143</sup> and had guffawed when Pressman demanded to know what a

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131. *Id.*

132. *Id.*

133. PERKINS, *supra* note 14, at 183.

134. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 22.

135. JAY FRANKLIN CARTER, THE NEW DEALERS 84 (1934).

136. Letter from Alger Hiss to Lawrence J. Nelson (Aug. 21, 1979), *quoted in* LAWRENCE J. NELSON, KING COTTON’S ADVOCATE: OSCAR G. JOHNSTON AND THE NEW DEAL 87 (1999).

137. *Id.*

138. *Id.*

139. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 154–55.

140. *Id.* at 89, 168.

141. LEUCHTENBURG, *supra* note 20, at 76.

142. Interview by Donald R. Lennon with J. Con Lanier, *supra* note 8, at 23–24.

143. Stevenson, *supra* note 90, at 2.



proposed agreement would look like for “macaroni growers.”<sup>144</sup> More generally, the commodities men accused the legal division of making policy rather than simply stating the law. Peek claimed Frank was “so certain of his cleverness that he thought he could frame new laws or interpret old laws in such a manner as to carry out the theories he held.”<sup>145</sup> Davis also believed Frank thought himself “a prime policy man and not just a legal man.”<sup>146</sup>

But Wallace had assured Frank when hiring him that he would be “more than a lawyer.”<sup>147</sup> When Peek told his general counsel that his views on policy were unwelcome, Frank countered that he and his lawyers could not possibly “dismiss all questions of policy as none of their business.”<sup>148</sup> His first argument was a general claim, rooted in his jurisprudence, that law was what the courts decide and that their decisions turned in part on “the economic desirability of a particular statute, contract or other instrument.”<sup>149</sup> To that extent, “policy influences a lawyer’s opinion on almost anything.”<sup>150</sup> His second argument was particular to the Agricultural Adjustment Act. Secretary Wallace’s orders were lawful only insofar as they effectuated its policies. “[W]hat was a lawyer to do with a statute,” he demanded, when its interpretation “depended upon, according to its very verbiage, whether it was effectuating a certain policy” declared therein?<sup>151</sup>

With Davis, Frank made a show of not crossing a line he had earlier declared “impossible to draw.”<sup>152</sup> He scribbled “okay as to law, no comment as to policy” so often on memos that an AAA official gave him a rubber stamp of the phrase.<sup>153</sup> Frank assured Davis that he had “leaned over backwards to avoid” expressing policy “under the guise of a legal opinion.”<sup>154</sup> Nothing would be more unfair, Frank declared, than if a general counsel were to convert his “judgment on pure policy into a judgment about

144. LEUCHTENBURG, *supra* note 20, at 76. In Pressman’s defense, Peek’s biographer volunteered that the lawyer might have been following a usage in the trade by referring to durum wheat by the name of the pasta. FITE, *supra* note 22, at 261 n.22.

145. PEEK, *supra* note 17, at 21.

146. THE REMINISCENCES OF CHESTER C. DAVIS 291 (Oral History Research Office 1953).

147. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 164; *see* Memorandum from Jerome Frank on Tentative Suggestions for Basic Principles to be Embodying in Marketing Agreements with Processors Under the Agricultural Adjustment Act (July 7, 1933) (on file with the Jerome New Frank Papers, Yale University Library); *see also* GLENNON, *supra* note 29, at 221 n.121.

148. Memorandum from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to George N. Peek, Adm’r, Agric. Adjustment Admin. (Oct. 25, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

149. Memorandum from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Chester C. Davis, Adm’r, Agric. Adjustment Admin. (Oct. 26, 1934), *quoted in* GLENNON, *supra* note 29, at 96.

150. *Id.* For more, *see* LAW AND THE MODERN MIND, *supra* note 47; and *see also* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 233, 233 (1931); and Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761 (1931).

151. THE REMINISCENCES OF JEROME N. FRANK, *supra* note 26, at 165.

152. Memorandum from Jerome N. Frank, *supra* note 148.

153. NELSON, *supra* note 136, at 83.

154. Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Chester C. Davis, Adm’r, Agric. Adjustment Admin. 2–3 (Feb. 9, 1934) (on file with the Jerome New Frank Papers, Yale University Library).

the law.”<sup>155</sup> But of course, “insofar as a policy question has an obvious legal aspect—as for instance whether a license or agreement violates ‘the declared policy of the Act’”—Frank would have to consider the policy in question.<sup>156</sup>

A full telling of how Frank and his lawyers understood and deployed the distinction between law and policy requires more space than a contribution to a Colloquium affords. So does an adequate illumination of the murky matter of the Ware group’s influence on Frank and his legal division.<sup>157</sup>

But briefly, most accounts have highlighted the controversy that precipitated the purge of February 1935, which did not involve marketing agreements but a provision in the “cotton contract,” drafted by Alger Hiss, that required planters to maintain sharecroppers on their property after taking land out of production in exchange for federal payments.<sup>158</sup> The administrators understood this provision (“Section 7”) only to require that planters keep the same number of sharecroppers on their land, but the lawyers, eager to help “the forgotten men of the New Deal,” more than half of them African American, held that the planters had to let the same croppers remain unless they had so conducted themselves “as to have become a nuisance or a menace to the welfare of the producer.”<sup>159</sup> Called to task by Davis, Hiss showed how the ambiguous language could be read the lawyers’ way and reminded him that under the statute the ultimate interpreter was not the administrator of the AAA but the Secretary of Agriculture.<sup>160</sup>

Hiss’s approach to interpreting Section 7 tracked, *ceteris paribus*, Mr. Try-It’s (of Frank’s AALS address) interpretation of the “certain statute.”<sup>161</sup> If Mr. Try-It began with his own judgment that “a proposed program for the relief of the destitute” was desirable,<sup>162</sup> Hiss explained that “we wanted

155. *Id.* at 2.

156. Letter from Jerome N. Frank, Gen. Counsel, Agric. Adjustment Admin., to Chester C. Davis, Adm’r, Agric. Adjustment Admin. (June 27, 1934) (on file with the Jerome New Frank Papers, Yale University Library).

157. Schlesinger wrote that the members of the Ware group induced the AAA liberals to do “nothing of importance” that they “would not have done anyway.” SCHLESINGER, *supra* note 6, at 54. Irons could find “no evidence that Communist Party membership or sympathy affected in any way their work as lawyers, or that they acted differently from their colleagues who were Democrats or even conservatives.” IRONS, *supra* note 4, at xii.

158. IRONS, *supra* note 4, at 156–80. A more frequent source of conflict between AAA lawyers and administrators was, as Davis put it, Frank and Pressman’s insistence “on carrying the power of examination of books far beyond the transactions” governed by marketing agreements. THE REMINISCENCES OF CHESTER C. DAVIS, *supra* note 146, at 311. Pressman was particularly aggressive in negotiating milk marketing agreements and had assigned John Abt the extracurricular task of critiquing AAA’s milk program as “a tool of the dairy interests.” ABT, *supra* note 11, at 39. Some months before the purge, Jackson learned that milk distributors were plotting to oust Frank. Letter from Gardner Jackson to Richard Rovere, *supra* note 61, at 3. Pressman, Rotnem, and Jackson were among the purged; none oversaw the AAA’s cotton program. IRONS, *supra* note 4, at 179.

159. DAVID EUGENE CONRAD, THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL 4, 141–43 (1965); FINEGOLD & SKOCPOL, *supra* note 16, at 145; IRONS, *supra* note 4, at 175.

160. IRONS, *supra* note 4, at 175–76.

161. See NELSON, *supra* note 136, at 87–88.

162. Frank, *supra* note 1, at 12,413.

to . . . aid the 'forgotten men,' the tenants and sharecroppers at the bottom of the structure, at least as much proportionately as we aided the landlord."<sup>163</sup> If Mr. Try-It next determined that "the administration is for [the program] and justifiably so," Hiss maintained that the legal division "had been led to believe (and reasonably led to believe) the Administration wanted" to protect the sharecroppers.<sup>164</sup> If Mr. Try-It then "work[ed] out an argument . . . so to construe the statute as to validate this important program,"<sup>165</sup> Hiss approved the opinion section's conclusion that Section 7 required planters not to displace sharecroppers without cause.<sup>166</sup>

According to Jackson, Frank had originally considered farm labor "political dynamite" the legal division "simply couldn't afford to touch."<sup>167</sup> Yet, "as the months wore on and the impact of the plight of the sharecroppers and other field laborers was borne in on him more and more, Jerry shifted away from such strict adherence to political caution."<sup>168</sup> Pressman, Jackson claimed, had been "a key factor in bringing about this shift."<sup>169</sup> Frank's original reading of the political landscape proved correct when Davis, returning from a vacation in late January 1935 to find Southern congressmen protesting the legal division's opinion, convinced Wallace that they would force the Secretary from office if he did not rescind the order and give Davis permission to fire Frank and his allies.<sup>170</sup> Frank had earlier written Wallace that only the legal division could authoritatively interpret Section 7.<sup>171</sup> After talking to Davis, however, Wallace wrote of Frank and Hiss, "While I am no lawyer, I am convinced that from a legal point of view, they had nothing to stand on and that they allowed their social pre-conceptions to lead them into something which was not only indefensible from a practical agricultural point of view but also bad law."<sup>172</sup>

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163. NELSON, *supra* note 136, at 87–88.

164. *Id.* Hiss did not identify his basis for this claim, beyond his reference to Roosevelt's famous invocation of the "forgotten man at the bottom of the economic pyramid" in a campaign speech on April 7, 1932. DONALD A. RITCHIE, *ELECTING FDR: THE NEW DEAL CAMPAIGN OF 1932*, at 86 (2007). FDR's target on that occasion was the lending policy of the Reconstruction Finance Corporation, a matter without obvious implications for sharecroppers' tenure.

165. Frank, *supra* note 1, at 12,413.

166. NELSON, *supra* note 136, at 87–88; Frank, *supra* note 1, at 12,413. Hiss was on loan to a congressional investigation during the drafting of the memo and returned to the AAA in the evening. Although Hiss approved the memo, David Lloyd Kreeger wrote the initial draft, which was edited and reviewed by Telford Taylor and Francis Shea, chief of the opinion section. None were members of the Communist Party or fellow travelers. Letter from Jerome Frank to Chester C. Davis (Feb. 4, 1935) (on file with the Alger Hiss Family Papers, Tamiment Library and Robert F. Wagner Labor Archives, New York University); *see also* R. Leon Benham, *The Purge in the Agricultural Adjustment Administration 185–92* (1987) (unpublished Ph.D. dissertation, Emory University) (on file with author).

167. Letter from Gardner Jackson to Richard Rovere, *supra* note 61, at 9.

168. *Id.*

169. *Id.*

170. THE REMINISCENCES OF CHESTER C. DAVIS, *supra* note 146, at 390–95. Tugwell, who would have argued Frank's case to Wallace, was away in Florida. Lowitt, *supra* note 3, at 617.

171. GLENNON, *supra* note 29, at 99; IRONS, *supra* note 4, at 169–70.

172. Diary of Henry A. Wallace (Feb. 4, 1935), *quoted in* Lowitt, *supra* note 3, at 615.

Years later, Jackson described what happened next. After Frank met with Davis but before he confirmed his dismissal with Wallace, the seven purgees and perhaps twenty others gathered in the general counsel's large corner office. Jerry "was in a high state of emotion," Jackson recalled.<sup>173</sup> He "talked and talked and talked to us all in that peculiarly fervent and unselfconscious way so characteristic of him," pacing behind his desk, pausing to drag on his cigarette and gaze down the Potomac.<sup>174</sup> Wallace could not possibly have approved Davis's action, he declared.<sup>175</sup> Why, Wallace had just backed his lawyers in a tussle with the commodities men over a books-and-records clause in the canned asparagus code. "This was simply Chester's bid for power. He was making a play to force Henry out of the secretary's chair so that he could occupy it himself."<sup>176</sup>

Pressman demurred. "[S]cathing in his ridicule," he derided Frank as a "romanticist" and a "sucker" for thinking that his personal relationship with Wallace would save them.<sup>177</sup> "How can you be so naive?" he demanded. "Some day maybe you'll grow up and come to understand that friendship doesn't count when a man's ambition for position and power is at stake."<sup>178</sup> "If I were in Wallace's position, I would approve it. The political necessities are such that he can't follow any other course."<sup>179</sup>

Contemporaries would reach their own conclusions about Frank's tenure as AAA general counsel. The business journalist W. M. Kiplinger voiced one when he contrasted the reformers at USDA with two drafters of the Securities and Exchange Act of 1934. "Tom Corcoran and Ben Cohen have done a swell job," Kiplinger wrote Raymond Moley, formerly of Roosevelt's Brains Trust.<sup>180</sup> "They are both quick to learn how to wiggle through the line and still not fumble the ball. It's a quality which such men as Wallace, Tugwell and Frank just will not acquire."<sup>181</sup>

For Kiplinger, "the ball" was public policy: the protection of investors in Corcoran and Cohen's case; the protection of consumers in Frank's.<sup>182</sup> The ball can also be thought of as the professional authority of lawyers. As the sociologist Terence Halliday has noted, because lawyers assert "technical authority in a normative system, namely, the law," they have "an unusual opportunity to exercise moral authority in the name of technical advice."<sup>183</sup> But a danger lurks within that opportunity. So readily can they move from

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173. Letter from Gardner Jackson to Richard Rovere, *supra* note 61, at 1.

174. *Id.* at 2.

175. *Id.*

176. *Id.*

177. *Id.* at 4.

178. *Id.*

179. THE REMINISCENCES OF GARDNER JACKSON, *supra* note 78, at 618.

180. Letter from W. M. Kiplinger to Raymond Moley, Editor, *Today* (May 16, 1934) (on file with the Thomas G. Corcoran Papers, Library of Congress).

181. *Id.*

182. *See id.*

183. TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 41 (1987).

one form of authority to another—from law to policy—that the lawyers themselves can “become uncertain as to the bounds of their expert role.”<sup>184</sup>

Mr. Absolute might have been deluding himself when he imagined law as “legal principles [that] must prevail absolutely,” but his legal formalism allowed him to assert his professional authority from high ground.<sup>185</sup> Mr. Try-It, who presumably shared Frank’s functionalist understanding of law as the judicial recognition of social needs, occupied less easily defended terrain. Perhaps he could still claim a kind of technical authority by arguing that lawyers were better than administrators at predicting how judges responded to those needs, but if the immanent rationality of society would ultimately carry the day, why were city-bred lawyers better at divining it than administrators who knew agriculture firsthand? And did lawyers’ technical expertise extend to identifying which of several seemingly functional courses of action would ultimately prevail? Arguably, the social order of the Cotton South required that sharecroppers received shelter and a share of the AAA’s benefit payments. But arguably, too, it required a curtailment of cotton production obtainable only through the AAA, which planters would abandon rather than see it endow their sharecroppers with a federally enforceable possessory right. Could AAA lawyers really predict which perception of social need would guide judges when they interpreted the ambiguous language of Section 7?<sup>186</sup>

Frank may have thought they could, but others were unconvinced. Mr. Jerome Frank was “a brilliant lawyer,” the public administration scholar Leonard D. White wrote, but his “principal interest in the AAA was undoubtedly policy and not law.”<sup>187</sup> He had “indulge[d] in the luxury of insisting upon his theory of social organization” when he should have just given legal advice.<sup>188</sup> Corcoran called Frank a “doctrinaire damn fool.”<sup>189</sup> He and other government lawyers thought what Frank derided as the “Jovian fiction” of legal certainty was too valuable a source of technical authority to jeopardize with “gratuitous candor” about the inextricability of law and policy.<sup>190</sup> Protecting consumers and sharecroppers were laudable goals, but in pursuing them Frank had gravely misjudged the political forces he faced.

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184. *Id.*

185. Frank, *supra* note 1, at 12,413.

186. Here I have benefited from Robert W. Gordon’s incisive comments on Frank in *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES 75*, 100–01, 105–07 (Anthony T. Kronman ed., 2004).

187. LEONARD D. WHITE, *GOVERNMENT CAREER SERVICE* 90–91 (1935).

188. *Id.*

189. Letter from Thomas Corcoran to Felix Frankfurter (on file with the Thomas G. Corcoran Papers, Library of Congress).

190. *Id.*; Frank, *supra* note 1, at 12,413; Letter from Felix Frankfurter to Jerome N. Frank, *Reconstruction Fin. Corp.* (Dec. 11, 1935) (on file with the Felix Frankfurter Papers, Library of Congress); Letter from Felix Frankfurter to Jerome N. Frank (Dec. 6, 1935) (on file with the Felix Frankfurter Papers, Library of Congress).

At least some well-connected government lawyers blamed radicals on his legal staff for leading him astray.<sup>191</sup>

Jerome Frank at the AAA thus became an object lesson on how not to be a general counsel. Government lawyers might enforce policies only imperfectly expressed in their enabling statute (as the protection of consumers was in the Agricultural Adjustment Act), but their professional authority would fail them if they sought to effect fundamental social change without a strong legislative mandate. “[Y]ou cannot change the basic economic structure of a society that doesn’t want to change, just by edicts from the center,” even Alger Hiss belatedly concluded.<sup>192</sup> Making public officials act not by decree or for self-aggrandizement but in accordance with law has been a sufficient challenge for government lawyers, and a vital one.

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191. JOSEPH ALSOP & ROBERT KINTNER, *MEN AROUND THE PRESIDENT 72–74* (1939); THOMAS H. ELIOT, *RECOLLECTIONS OF THE NEW DEAL: WHEN THE PEOPLE MATTERED* 15 (1992).

192. IRONS, *supra* note 4, at 180.